Comments to the
Initial Findings and Draft Recommendations of the

Task Force on Improving the National Environmental Policy Act and
Task Force on Updating the National Environmental Policy Act

Committee on Resources United States House of Representatives

Submitted by

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Summary

Thank you for the opportunity to comment. The following is provided with reference to the *Findings and Recommendations* produced by the Task Force of the Committee on Resources of the House of Representatives. Although now retired, during my almost thirty years as an Environmental Planner in both the public and private sector, I have had the opportunity to both prepare and review a number of EISs. While I can attest to the fact that it is often difficult to deal with the public and public issues, it is more important to recognize that public concerns are considered and addressed. Democracy is often "untidy" to quote a current administration official.

NEPA, of course, has been an excellent tool in ensuring that government is made accountable for major and significant actions (granted, somewhat subjective terms). The thrust of the Task Force's work is oriented towards, to paraphrase, "streamlining" and "updating" NEPA. While the intention is, in part, to speed up the process- this shouldn't be the issue. Although no one wants to see an inordinate amount of time taken for the completion of an EIS, more important is ensuring that the concerns fostered by the action are documented, considered and explained. As some of the testimony offered to your committee indicates, it is often the federal agency that is at fault for the delay. The public should not be penalized for something that is often beyond their control, generally requiring them to rely on the courts for relief. As far as "updating," while fine-tuning

may be desirous, the original mission should not be tampered with. To repeat, unless the attempt is being made to gut the legislation we must recognize that issues such as reducing the time taken in preparing an EIS is less important than ensuring that the proposed work is comprehensively investigated.

An additional item that the Committee seems to be considering (although modified in the recommendations) is limiting the ability to litigate issues associated with an EIS. Hopefully, the Committee will not go down that path (I'm not sure under the Constitution how this could be done anyway). Since the process as proposed is already weighted in favor of the government and other vested interests (e.g., oil and gas drillers) it is even more imperative that the public continue to be offered the opportunity to challenge government decision in the courts. After all, if litigation results, it is conceivable that the federal agency was remiss in considering what the public/communities/others deemed important. This would obviously be a step backward and appears to be part of a larger recent trend that seems to want to further limit the rights of the American public and enhance the control that private interests have over our lives. Access to the courts is obviously the only way the public has to ensure that its rights are protected.

We should be very careful not to destroy a perfectly good program that serves the public's interest because of others interests, those often with motives more profit oriented than directed towards the concerns of the public. I will speak to these concerns in the following paragraphs.

On a side note I think that the Task Force should have released the report during a time period when the public would be able to effectively use the entire 45 day review period. It doesn't seem quite fair to release the Report during the holiday season when the public is obviously engaged in other activities. If the Task Force really had the public's interest at heart it would have taken this time frame into consideration. The public is becoming increasingly cynical about how the government operates on a number of fronts. The release date on December 21, 2005 feeds that perception.

Before commenting on the actual findings and recommendations several other issues should be considered:

1. My first concern has to do with the mission of the Task Force. I'm somewhat perplexed as to why the House Committee on Resources decided to convene a Task Force and revisit an issue that a CEQ committee in 2003 reviewed in what appears to be a much more comprehensive, professional and in a balanced manner (despite my disagreement with a number of their conclusions and recommendations). The current Committee's testimony list, to cite an example of concern, is obviously weighted towards the business and development community and others with a problem with the current Act. If the work of the Committee was truly meant to "update" the law there would seem to have been a greater attempt to involve more interests and the public that are supportive of its current provisions.

2. If the recommendations are implemented (coupled with legislation such as the Energy Act of 2005) it appears that we are essentially beginning to dismantle what was intended as legislation designed to make government accountable for its actions. My concern is that in time more exceptions will be made, resources will be stripped away and ultimately NEPA will be ignored. Lest this concern be dismissed we appear to be going down the same road as we have with the reduction in effectiveness with other regulations such as the Mine Safety Act, the effectiveness of FEMA, etc. The public as is often the case will be the loser without adequate protections.

3. In the text and testimony there are too many anecdotal attempts to portray the current NEPA process as being too time consuming, and being an exercise in "paralysis by analysis." Candidly, the real reason for the changes which I believe is unstated, is that a particular interest group wishes to have the untrammeled power to proceed with its project in a manner how and where it feels appropriate. What may happen next in such circumstances, however, is that if the impacts are not considered, the project is undertaken and completed and the public has to live with the results. If you believe that that is overstated consider why NEPA was enacted in the first place. Environmental horror stories abounded resulting in the passage of such legislation. If you want examples of environmental indiscretions that would have benefited from oversight and evaluation it would be instructive to visit parts of Eastern Kentucky, West Virginia and Southern Ohio, and observe the results of the former, unregulated strip mining of coal. Today many of these areas, fortunately, are now required to be restored after extraction (if the issue is enforced) which came about because of the need to consider health and safety in addition to that of the environment. Unfortunately, as a result of actions taken prior to the enactment of NEPA, too many areas in this region today still closely resemble the terrain of the moon. Without this reality check in the beginning through NEPA, too many times the project proceeds ahead, the profits are made,

the company moves on and the public is left with the results. We should not go back down this path.

4. It has been over a generation since the NEPA legislation was enacted. I began my career in Cleveland, Ohio working for the Division of Water Pollution Control right after the Cuyahoga River fire. While I'm not necessarily a proponent of larger government, there are reasons why such regulations are necessary and appropriate.

5. The NRDC released a press release in the course of the committee's acceptance of testimony which is highly appropriate and is worth reiterating. It noted that "*As the* (committee's) *report acknowledges, nearly every witness and comment submitted to the Task Force mentioned that public participation is fundamental to NEPA's success. Yet, several of the Task Force's recommendations seek to limit who, when, and how the public can participate in all levels of the NEPA process, including appeals and litigation. These recommendations will weaken participation and disenfranchise the public.*" The truth remains that NEPA is a process that works to make certain ordinary citizens and others, not just special corporate interests, have a chance to participate in decisions and to ensure that all consequences are considered before an action is taken.

6. As the Task Force is well aware, NEPA has as one of its central themes the idea of active public participation in the review of "major" or "significant" federal projects. The public is afforded the opportunity to offer alternatives, to convey concerns about a particular major (or significant) federal action as well as to recommend options to make a project better. With the intended purpose of providing the public a key role in NEPA it is interesting that the Task Force did not appear to more actively solicit comments from the public on the proposed recommendations. It appears as if the Committee is less serious about public involvement and commentary, and more interested in gutting an important piece of legislation intended on making the government more accountable (aware?) for its potential impacts on Americans.

7. This amendment process should be conducted as open as possible if and when the recommendations proceed. The public needs to be fully involved, informed as to future hearings and should additional time be afforded for future review and in a time frame that allows for affective comment by the public and others.

Comments on Recommendations

Group 1 - Addressing Delays in the process

Recommendation 1.1*: Amend NEPA to define "major federal action." NEPA would*

be enhanced to create a new definition of "major federal action" that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures.

Major and substantial are extremely nebulous terms. A "major federal action" should continue to be weighted towards impact on the public. If an existing project is modified such to create an affect on the environment (including the human environment) it also should be subject to renewed review. Once again, the statement seems to place a greater emphasis on time, resources, etc. That misses the point of why an EIS must be undertaken.

Recommendation 1.2: ***Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed.***

Time should not be the sole issue- accomplishing the task at hand, the review of potential environmental impacts should be the mission. Otherwise the process could degrade into a *pro forma* exercise in "box checking." As noted earlier, unstated is that if time limits are enacted, the government must be required to release project information in a timely and comprehensive manner, has a duty to hold timely hearings and should be required to explain, *comprehensively* (emphasis added), why certain actions are to be taken and to answer the public's concerns (greater than a non-responsive answer such as " this was not felt to be appropriate, etc." that often serves as the government's response to an issue)

Recommendation 1.3*: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EA's and EIS's. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated* under a CE unless the agency has compelling evidence to utilize another process.

CE, agreed, need to be better defined. The example cited, however, essentially exempting so-called temporary activities (TA), may not be appropriate. A TA for example should be evaluated, as any other project, to determine whether in fact such environmental impacts are minimal. Terms such as "temporary," "minimal," "compelling," even possibly "clearly," among others with similar nebulous connotations, need to be defined and understood by the public and others.

Recommendation 1.4: *Amend NEPA to address supplemental NEPA documents. A*

provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii).

Supplemental NEPA documentation should also be required for those elements of a project related to the main project and should, therefore, be required to proceed. An example that I am familiar with is related to the proposed Yucca Mountain nuclear waste repository project in Nevada. The transportation of the nuclear waste which would have to occur nationwide as part of the program was not considered as part of the EIS evaluating the site of the repository. Such modifications to NEPA offered, could then conceivably, on a technicality, prevent the transportation of nuclear waste to be evaluated through NEPA. If this happened (many other examples could no doubt be cited) this would miss substantial impacts to millions of people. Obviously we don't want to do that. Another question is important regarding this provision. It is unclear who is required to make the showing? If the public is required to make the showing, time and resources are on the side of the government, and the public is conceivably placed at a disadvantage.

Group 2 - Enhancing Public Participation

Recommendation 2.1*: Direct CEQ to prepare regulations giving weight to localized comments. When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.*

I do not support this proposed change. Stating this, the comments of the local public are obviously to be given great deference. They must live with the results of the project. Also to be given deference, however, is the fact that certain authorities (so-called outside groups) may have expertise that needs to be considered that is not available locally. Examples would be those with knowledge of habitat and issues associated with the Endangered Species Act, that might not be available locally. A locally specific review may also miss impacts resulting in another area from activities associated with the proposed action.

Recommendation 2.2: *Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects.*

The mission should be to fully evaluate the impact and the EA/EIS, fully document the action and should be independent of an arbitrary defined page number. The term "complex projects," is another term of art that needs to be defined.

Group 3 – Better Involvement for State, Local and Tribal Stakeholders

Recommendation 3.1: ***Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. The definition would include the term "political subdivisions" to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA.***

I Support this provision. Once again though, the statement "*clear and convincing evidence*" needs to be pinned down.

Recommendation 3.2: *Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements*.

This could be a useful modification. The term "functionally equivalent" would need to be defined though.

Group 4 - Addressing Litigation Issues

Recommendation 4.1: *Amend NEPA to create a citizen suit provision. In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. If implemented, the citizen suit provision would:* **(Access to existing courts should be retained; this smacks of tinkering)**

• Require appellants to demonstrate that the evaluation was not conducted using the best available information and science**.**

Do not agree. Since NEPA requires the government to be accountable for its actions the responsibility for issues such as proof of methodology should not be placed on the public or those impacted to prove that a better method exists. The government is responsible to provide evidence that the best science is being utilized, as well as its limitations. The public and many governmental agencies obviously may not have

the resources to accomplish this task. It is incumbent on the agency promoting the recommendation to prove that the best information and science is being employed.

• Clarify that parties must be involved throughout the process in order to have standing in an appeal.

Provisions should be allowed for standing for any party as a result to changes in the project or supplemental assessment documents which may address impacts not considered, as an example, the original document.

• Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained.

Do not support. The meaning of this provision needs to be explained more fully.

• Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge;

Do not support, in part, because this provision is unclear and needs to be explained more comprehensively. A challenge should stand on its merits and not on who makes the challenge.

• Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the Federal action;

There should be exceptions allowed to ensure that information related to an action is made available in a timely manner. The terms "reasonable" and 180 days may be mutually exclusive. An arbitrary time frame should not be a limiting factor.

Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.

The term "pre clear" is nebulous and needs to be defined. Who does this and what are the criteria for filtering projects to cite several concerns. Perhaps I am unclear on the responsibilities of CEQ, but shouldn't they be already monitoring court decisions that influence EIS? If not, they should be also be provided the resources to accomplish these tasks.

Group 5- Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community).

Not clear who would be the "filter" in selecting the appropriate alternatives. The public and others should be afforded the opportunity to participate in this filtering process.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. A provision would be created that require an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.

How this "balancing" analysis would be accomplished needs to be better explained. Who defines the impacts, what is meant by "on balance," how the potential impacts are weighed and other issues need to be described.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the mitigation requirement should be made a legally enforceable condition of the license or permit.

Good provision. In any event monitoring needs to take place to ensure actions are taken.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process.

Consulting with stakeholders formally, and where necessary informally, should be mandatory. "Encourage" is not strong enough operative term. Particularly needed is more and better communication on why certain actions are taken or not taken.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 have spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied "horizontally" to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This codification would have to ensure consistency with lead agency provisions in other laws.

It is unclear how this provision is being modified. The term "horizontally" in the recommendation needs more explanation. A lead agency should still be required to interact with appropriate other state and federal agencies and the public potentially affected by the action.

Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality. This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action. Recommendation 7.2: Direct CEQ to control NEPA related costs. In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing

recommendations to Congress for some cost ceiling policies.

The agency should be required to interact with the public directly. An ombudsman could be useful if the office is permitted independence from CEQ,the lead agency, the individual(s) filling the position have competence in reviewing EISs and has sufficient resources to accomplish the tasks required. It should have the ability to effectuate changes if appropriate.

Group 8 - Clarify meaning of "cumulative impacts"

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions.

The wording is unclear in this recommendation. Understanding past actions may be integral to understanding the real impact from a proposed action. This may require using different methodologies and determining how past actions contribute to the current project. At a minimum, this section requires better clarification.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable."

Do not support. This potentially and prematurely eliminates the consideration of unanticipated future actions that may require evaluation as cumulative impacts. How the language needs to be modified also requires explanation. It is mentioned, however, so the Committee must have something in mind on how this would be accomplished. This should be explained.

Group 9 – Studies

Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:
a. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and
b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

This process should be open to review by the public and others.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff.

The experience should include familiarity with environmental issues, a mix of backgrounds of individuals encompassing public and private service, have independence and be provided with sufficient resources in all agencies to comprehensively accomplish these important responsibilities.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that at a minimum:
a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA's enactment interacts; and
b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

This provision should be examined carefully. Care should be undertaken, for example, to ensure that similar issues approached from different state and federal perspectives and understanding of the issues, are not construed as duplicative. Who is responsible for making these judgements need to be clarified.